Is and Ought Distinction in Legal Philosophy

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Introduction

The controversy over "Is" and "Ought" distinction appears in legal philosophy in two different contexts: of the discussion about the nature of legal reasoning and of the discussion about the sources of legal normativity (of "legal Ought"). In the former context, the controversy concerns the existence of the so-called logic of norms; in the latter it concerns the nature of "legal Ought," viz., its relationships to "moral Ought" and to "Is" (social facts). At first glance these two discussions may seem unrelated to each other, but, as will be shown in Conclusions, there are interesting connections between them. At the outset, prior to presenting these discussions and connections, one important observation needs to be made. The legal philosophers participating in these discussions are rarely interested in the problem of deriving "Ought" from "Is." They, in general, deem this task unfeasible and thereby, so to speak, respect Hume's famous ban called by Max Black (1964) "Hume's guillotine." It must be admitted, though, that there have appeared occasional discussions of this problem in legal philosophy (e.g., von Wright 1985), but their conclusions were usually that the purported derivations of "Ought" from "Is," proposed, e.g., by John Searle (1964) or Max Black (1964), are not convincing. They were regarded as unconvincing on three different grounds: that the "Ought" these derivations generate is tacitly included in the premises; or is a "technical Ought" (which specifies what ought to be done if a *given* norm "endowed" with "normative Ought" is to be satisfied); or is a hypothetical imperative in Kant's sense (which makes the duty –"Ought" – conditional on the agent's willingness to achieve a certain goal). However, it bears repeating that the problem the legal philosophers most frequently tackle in the context of the discussion about the existence of the logic of norms *is not* whether "Ought" can be derived from "Is," i.e., whether "Ought-sentences" can function as conclusions in inferences with descriptive premises. The problem they usually tackle is, *firstly*, whether *normative* logical inferences, i.e., inferences in which "Ought-sentences" function as conclusions *and* premises, are possible and, *secondly*, whether "Ought-sentences" can, similarly to "Is-sentences," be assigned truth values (the positive answer to the latter question does not, of course, infringe upon Hume's ban: from the fact that norms can be true or false does not follow that the gap between "Is" and "Ought" can be bridged). In the context of the problem of the sources of legal normativity, the question they pose is how to justify the normativity of law (i.e., the fact that legal statements can be aptly

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conceived of as "Ought-statements") on the assumption that "legal Ought" cannot be derived from "Is" (factual statements).

The Problem of the Logic of Norms

The problem of the existence of the logic of norms was famously stated by Jörgen Jörgensen (1937) in the form of the following "dilemma":

1. Norms have no logical value: they are not capable of being true or false.
2. Only those sentences which are capable of being true or false can function as premises or conclusions in logical inferences.
3. Therefore norms cannot function as premises or conclusions in logical inferences.
4. Nevertheless, they seem to be able to function as premises and conclusions in logical inferences (Jörgensen provides the following example of such an inference: Keep your promises; This is a promise of yours; therefore: Keep this promise).

As can be easily seen, the core of the dilemma is the conflict between sentence (3) and sentence (4). And since sentence (3) is a conclusion derived from sentences (1) and (2), the dilemma could be resolved by rejecting one of these sentences or by rejecting sentence (4). Given that sentence (4) can hardly be rejected (since reasoning on norms is very intuitive, norms can hardly be regarded as incapable of functioning as premises and conclusions in logical inferences), the only "strategies" of resolving the dilemma seem to be the rejection of sentence (1) or (2). The rejection of sentence (1), which expresses the noncognitivist view of the nature of norms, is tantamount to accepting the cognitivist view, according to which norms are capable of being true or false. This "strategy" is much less "revolutionary" than the strategy which assumes that premises and conclusions of logical inferences need not have a logical value; the latter strategy would amount to the rejection of the standard metalogical view according to which logical entailment (consequence) is a "truth-preserving relation," which consists in "the transmission" of truth from premises to conclusions (more precisely: a set of premises P logically entails a conclusion C if whenever P is true, C must also be true). However, the former strategy, i.e., the rejection of the noncognitivist view of norms, is not attractive for the naturalistically minded philosophers, especially those who feel sympathy for logical positivism. But there is one more option open for these philosophers: they can *partly* reject, or, rather, modify, the sentence (4) by claiming that the purported inferences on norms are in fact inferences on factual statements. This view can be assigned to Jörgensen whose one solution (of the two he proposed) to his "dilemma" was that norm (imperative) sentences can be analyzed into two factors: the imperative and the indicative, the latter describing the factual contents of the norm. As he wrote: "the ordinary rules of logic being valid for the indicative sentences which can be derived from the imperative ones, and no specific rules for the imperatives being known (unless it should be the rule governing the derivation of the indicative sentence from the imperative one) there seems to be no reason for, indeed hardly any possibility of, constructing a specific "logic of imperatives" (Jörgensen 1937: 296). However, his second (alternative) proposal, arguably less preferred by him, did not imply (though Jörgensen did not say it explicitly) that there is no need for a specific logic of normative sentences (even if it *did imply* that there is no need for *the logic of imperatives*). According to this proposal, imperative sentences of the form "Do so and so" should be transformed into indicative sentences of the form "Such and such action is to be performed, resp. Such and such state of affairs is to be produced"; as he wrote: "here the imperative factor is transformed into the phrase "is to be etc.," which is a kind of auxiliary concept that may function as a predicate in an indicative sentence" (Jörgensen 1937: 292). This second solution proposed by Jörgensen but not developed by him at greater length anticipates deontic logic, i.e., the logic with the normative (deontic) operators referring to basic normative concepts such as obligation, prohibition, and permission.

Deontic logic was put forward in the 1950s and 1960s (cf. von Wright 1951, Kalinowski 1953, von Wright 1963), and with its emergence, the discussion about the existence of the logic of norms took a new turn. The question was no longer whether logic of normative concepts is at all possible (deontic logic *is* a logic of this kind) but how it should be philosophically interpreted. Since deontic logic operates on norm-sentences (e.g., "it is obligatory that *p*" or "it is prohibited that *p*," where "p" refers to what Jörgensen called the "indicative factor," i.e., the state of affairs or an action to which the deontic operator refers), the problem of interpretation boiled down to *the question of whether norm-sentences are normative statements*, i.e., *expressive of norms* (*equivalently: are norms themselves*) *or whether they are descriptive statements about norms* which state that, according to a given normative (e.g., legal) system, an action or bringing about a certain state of affairs is obligatory, prohibited, or permitted. To paint with a broad brush: noncognitivists interpret deontic logic as operating on descriptive statements about norms, whereas cognitivists tend to take one of the following views: (a) that deontic logic may be viewed as a logic of norms and thereby can be interpreted as referring to norms themselves rather than to statements about norms or (b) that apart from deontic logic there exists a separate logic of norms (cf. Kalinowski 1972, 1985). It should be mentioned in this context that logic of norms and deontic logic are to be distinguished from "legal logic (*logique juridique*)" analyzed and developed by Chaim Perelman (1976): while the former types of logic refer to reasoning on norms, i.e., formalize relationships between normative or mixed (normative-factual) premises and normative conclusions, the latter is focused on the premises themselves, viz., on what type of argumentation makes them justified. Now, the basic difference in the state of the discussion about the existence of the logic of norms in the 1950s and later as compared to its state at the time when Jörgensen formulated his dilemma can be stated as follows. After the emergence of deontic logic, cognitivists have not only believed (like in Jörgensen's times) that a logic of norms *is possible* but, also, that *such a logic exists*, viz., as deontic logic or as a separate logic underlying deontic logic (cf. Kalinowski 1967, 1972, 1985). Noncognitivists, in turn, have maintained that the logic of norms is impossible but added that such a logic (even if it were possible) is not necessary because its function (that of the formal analysis of the relationships between normative premises and normative conclusions) is fulfilled by deontic logic. Their view is, therefore, in an essential point different from Jörgensen's first solution to his dilemma. While Jörgensen asserted that there is no need for the logic of norm-sentences, because, given the indicative factor of norms, its function is fulfilled by the "ordinary logic" operating on indicative sentences, they have believed that there is a need for such a logic because it allows to capture the relations between deontic operators of obligation, prohibition, and permission. Interestingly, one may argue for the impossibility of the logic of norms (as distinct from deontic logic) in two different ways. The standard way consists in denying the "cognitive" character of norms, i.e., in claiming that they are not capable of being true or false. The nonstandard way consists in negating the linguistic status of norms (and, as a result, their "cognitive" character); according to the latter view, norms are not linguistic statements, but *nonlinguistic* products of performative (linguistic) acts (cf. Woleński 1980).

By way of summary, it is worth repeating what has been already hinted at in the Introduction, viz., that the problem of the existence of the logic of norm-sentences is independent from the problem of whether "Ought" can be derived from "Is." In other words, Hume's guillotine poses no obstacle for constructing a logic of norm-sentences: what is crucial for the question about the existence of the logic of norms, its relation to deontic logic, and the interpretation of deontic logic is not whether "Ought" can be derived from "Is" but whether norms are capable of being true or false.

At the end of this section, one more aspect of the problem of the relations between "Is" and "Ought" should be mentioned, viz., the aspect connected with the principle "Ought implies Can" One might argue that the principle shows that "Is" ("Can" is a factual statement and

therefore is a kind of "Is") can be inferred from "Ought." This argument, however, cannot be sustained; as was aptly remarked by Georg Henrik von Wright, "'you ought so therefore you can' is not a logical entailment but an affirmation of the reasonableness of the command" (von Wright 1985: 269).

The Problem of the Normativity of Legal Rules

The problem of the normativity of legal rules boils down to the question of what features of a legal system justify the claim that legal rules provide reasons for action and that thereby they give rise to "Ought." Clearly, the very fact that the observance of legal rules is enforced by sanctions executed by the state does not provide a sufficient explanation of the normativity of law. If any system of rules enforced by sanctions could count as creating "Ought," then even purely criminal organizations, unaccepted by citizens but exerting power over them, might be regarded as generating a system of rules. This is counterintuitive: for rules to be *rules*, i.e., to be endowed with "Ought," they must be embedded not in – or not only in – the citizens' fear of sanctions for violating these rules; they must also give rise to their conviction that it is (at least prima facie) *right* to comply with these rules. How, then, the normativity of legal rules can be justified? There are two main approaches to this problem: the legal-positivistic and the *ius*-naturalistic. The first approach implies that the normativity of legal rules is to be strongly distinguished from the normativity of moral rules; "legal Ought" is therefore essentially different "moral Ought." The second approach implies that "legal Ought" has a moral aspect and therefore can be dubbed "legal-moral Ought." It is worth discussing these two approaches in somewhat greater detail.

(*Legal positivism: "legal Ought"*) According to the adherents of legal positivism, law is a system of rules created in a way determined by a specific social rule called by Herbert Lionel Adolphus Hart "a rule of recognition." This rule determines the conditions of legal normativity, i.e., specifies what conditions must be satisfied for a legal rule to be created, modified, or annulled or, more generally, for a rule to acquire a normative aspect of "legal Ought." On this view, law is therefore ultimately embedded in a social rule which is special kind of a social fact, viz., "a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts (Hart 1994, p. 256)." This is the so-called *Social Thesis* of legal positivism (this thesis implies the so-called *Separation Thesis*, which says that there is no definitional connection between law and morality and that thereby it may be the case, if the rule of recognition does not count among the conditions of normativity of legal norms their consistency with morality, that even immoral law is still law). But, given its Social Thesis, one may argue that legal positivism reduces "legal Ought" to "Is," i.e., to a social fact, violating Hume's ban, and that thereby it does not provide an adequate explanation of the fact that legal rules provide reasons for action (*assuming it to be the fact* because some legal philosophers, e.g., American and Scandinavian legal realists, on some interpretation of their views, claim that there is no "legal Ought" and that thereby the phenomenon of law can be exhaustively described in purely factual categories). In response to this argument, a legal positivist may adopt three different strategies.

Firstly, he may argue that the social fact in which "legal Ought" is grounded is *a rule* and that thereby the justification of the normativity of legal rules is based on "Ought" rather than on "Is." This argument, however, cannot be sustained since the rule of recognition is conceived by legal positivists in factual terms – as a certain kind of social practice, viz., the practice of judges which consists in accepting and applying in their activities the law-identifying criteria.

Secondly, some legal philosophers (cf., e.g., Postema 1982) have argued that the rule of recognition is a *special kind of fact*, namely, *social convention* (in a game-theoretic sense), which *by its very nature* is normative and thereby can "generate" legal normativity. According to the famous definition of convention provided by David Lewis

(1986: 76), a regularity *R* in the behavior of members of a population *P* when finding themselves in a recurrent situation *S* is a convention if and only if it is true that, and it is common knowledge in *P* that, in any instance of *S* among members of *P*:

- Everyone conforms to *R*.
- Everyone expects everyone else to conform to *R*.
- Everyone has approximately the same preferences regarding all possible combinations of actions.
- Everyone prefers that everyone conform to *R*, on condition that at least all but one conform to *R*.
- *R* is arbitrary, i.e., everyone would prefer that everyone conform to *R′*, on condition that at least all but one conform to *R′* (where *R′* is some possible regularity in the behavior of members of *P* in *S*, such that no one in any instance of *S* among members of *P* could conform both to *R′* and to *R*).

The feature of convention which is important in the context of the discussion about the sources of legal normativity is that it is a Nash equilibrium and thereby is *self-enforcing*, i.e., no one has an interest in violating a convention if everyone follows it. In other words, the normativity of conventions directly stems from the requirements of instrumental rationality. Now, if the rule of recognition were a social convention in the game-theoretic sense, one could say that normativity (in the sense of instrumental rationality) is, so to speak, inscribed in it and is subsequently "transmitted" from it to lower-order (primary) legal rules. Unfortunately, it is by no means clear that the rule of recognition is a social convention (in the game-theoretic sense). One can raise at least two arguments against this interpretation of the rule of recognition:

(a) It is not very plausible to maintain that judges follow the rule of recognition just because it is generally practiced; it seems they have other (or additional but more important) reasons to follow it, e.g., their reasons for their regarding legislation as a source of law may be that it is a democratic and economically efficient way of lawmaking (cf. Green 1999: 39–40).

(b) It can hardly be argued that for each rule of recognition, one can imagine an alternative rule that enables achieving the same purpose (and therefore that the rule of recognition is arbitrary in the relevant sense); it is not obvious that having some rule of recognition is more important than having any particular rule. The question of whether the rule of recognition is a social convention, however, is still an open one. For instance, Andrei Marmor (2009) argues that the rule of recognition can be regarded as a convention, giving rise to a specifically "legal Ought," on condition that convention is conceived of as *constitutive* (rather than, as within game theory, as coordinative), i.e., as *constituting the very phenomenon of law.*

Thirdly, one may reject or weaken the Social Thesis of legal positivism. This step was taken by Hans Kelsen (1967), whose so-called pure theory of law is sometimes dubbed "critical legal positivism" (though one may justifiably ask whether a theory of law that rejects the Social Thesis can still be regarded as a version – even if critical – of legal positivism). Kelsen treated the fact that the law's requirements are imposed by sanctions as its essential feature. In his view, thus understood law is a unique entity (quite separate from morality as well as from natural and social facts) which belongs to a nonfactual sphere of *Sollen* ("Ought"). Kelsen therefore posited the existence of a separate sphere of *Sollen* (as opposed to the sphere of *Sein*) where he "located" legal norms. This view encounters manifold difficulties (e.g., it is not clear whether the distinction between *Sollen* and *Sein* is ontological or only epistemological or to which sphere moral norms belong), but they will not be discussed here. The point that is important in this context is how Kelsen introduced "legal Ought," i.e., legal normativity. Now, Kelsen claimed that *the normativity of law is presupposed by each legal system*. More precisely, in Kelsen's view, each and every effectively functioning legal system presupposes the

Basic Norm – a kind of norm that "confers" normativity on the entire legal system (from constitution through statutes to judicial decisions) and thereby gives rise to the sphere of "legal *Sollen*." Kelsen justified this claim by means of transcendental argumentation. He started from the assumption that legal rules possess a normative aspect, i.e., that they provide reasons for action, and then posed the question as to what must be presupposed for this normative aspect to be conceivable. His answer was that what must be presupposed in the Basic Norm. The notion of the Basic Norm as the source of normativity of all the other legal norms enabled Kelsen to avoid the (ungrateful) task (undertaken, in fact, by "non-critical" legal positivists) of deriving "legal Ought" from "Is."

None of these three strategies seem satisfactory: the first one omits the fact that the rule of recognition is a social fact (even if a complex one, embracing a set of normative convictions of judges); the second one makes a controversial assumption that the rule of recognition is a social convention; and the third one introduces ad hoc the Basic Norm whose ontological status is notoriously unclear. Accordingly, it seems that legal positivism does not tackle effectively the problem of the sources of legal normativity.

(*Ius-naturalism*: "*legal-moral Ought*") According to the classical theories of natural law, law is a system of *right* rules, i.e., rules concordant with morality; in consequence, "*lex iniusta non est lex*." This basic claim common to all classical natural law theories implies that among the necessary conditions of legal normativity, there is the requirement of concordance with morality. It is worth noticing that one can imagine an *extreme* version of natural law theories according to which concordance with morality is a necessary *and sufficient* condition of the normativity of a legal rule. But such a version was not supported by any serious representative of *ius*-naturalism. According to its dominant version, the source of normativity of (human-made) legal norms lies in morality, but one cannot speak about legal rules if some additional conditions are not fulfilled, i.e., if legal rules have not been adopted in a proper way determined by some "rule of recognition." As can be easily seen, the theories of natural law imply that the source of the normativity of legal rules is more variegated than the source of the normativity of moral rules: while moral rules acquire their normative character only by virtue of their satisfying certain criteria of moral acceptability (determined by a given moral theory, e.g., Kantianism or utilitarianism), legal rules become normative if and only if they satisfy the criteria of moral acceptability *and* have been properly enacted, i.e., in accordance with some social rule which provides conditions for creating legal rules (though, perhaps, it would be more apt to say, that, on the *ius*-naturalistic theories, legal rules are *rules*, i.e., provide reasons for action, and thereby are normative, because they are concordant with moral rules, and are *legal* rather than moral, because they satisfy the conditions of "legality" provided by some rule of recognition). Since natural law theories embed "legal Ought" in "moral Ought", the former has in fact also a moral aspect; hence, on the ground of the *ius*-naturalistic theories of law, "legal Ought" is in fact "legal-moral Ought."

The theories of natural law, in contradistinction to legal positivism, have no difficulty with finding the source of legal normativity: the source is "moral Ought." However, their success in this regard is achieved at the cost of introducing a notoriously unclear (which does not mean implausible) concept of "natural law."

Conclusions

The two problems discussed in this article – that of the existence of the logic of norms and that of the sources of legal normativity – might seem at first glance unrelated to each other in the sense that one can consistently combine every answer to the latter with every answer to the former. But this impression would be mistaken, since, on closer analysis, it turns out that certain combinations of the answers to these problems prove to be mutually inconsistent: the "link" between these problems is the controversy "cognitivism versus noncognitivism." If one is a cognitivist, and thereby accepts the logic of norms (as different

from deontic logic), then one will be more likely to prefer the *ius*-naturalistic approach to the problem of the sources of legal normativity than the legal positivist approach. In other words, if one believes that a certain system of moral norms is *true*, and that thereby "moral Ought" exists, then one will be reluctant to separate this "Ought" from "legal Ought"; rather, one will be inclined to embed the latter in the former. But there is no inconsistency in being a cognitivist and legal positivist. By contrast, if one is a noncognitivist (and thereby accepts only deontic logic and interprets it as operating on statements about norms rather than on norms themselves), one cannot adopt the *ius*-naturalistic approach to the problem of the sources of legal normativity: the existence of "moral Ought" is the assumption of the theories of natural law and noncognitivism implies that "moral Ought" is a fiction.

Cross-References

- ▶ Basic Norm (Kelsen)
- ▶ Is and Ought Distinction in Hume's and Kant's Philosophy
- ▶ Kans Kelsen (on Legal Science)
- ▶ Legal Rules and Deontic Logic
- ▶ Legal Validity
- ▶ Natural Law Theory
- ▶ Ontology of Law
- ▶ Positive Law and Natural Law

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